

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Petitioner,

v.

MICROSOFT CORPORATION,

Respondent.

No. 2:14-mc-00117-RSM

MOTION TO CONSOLIDATE
RELATED CASES

NOTE ON MOTION CALENDAR:
January 16, 2015

I. INTRODUCTION

Microsoft Corporation ("Microsoft") respectfully moves the Court to consolidate the following nine cases with the instant case. All of these cases are related and currently pending in the Western District of Washington (the "Western District Related Cases"):

United States v. Mundie, 2:14-mc-00125-RAJ-BAT
United States v. Raikes, 2:14-mc-00126-JLR-MAT
United States v. Ballmer, 2:14-mc-00127-JCC-BAT
United States v. Allchin, 2:14-mc-00128-RSM-MAT
United States v. Roskill, 2:14-mc-00129-RAJ-JPD
United States v. Ayala, 2:14-mc-00130-MJP-MAT
United States v. Ernst & Young, LLP, 2:14-mc-00131-MJP-JPD
United States v. Microsoft Corp., 2:14-mc-00134-RAJ
United States v. Microsoft Corp., 2:14-mc-00133-RAJ

1 Consolidating the Western District Related Cases with this case, all of which involve
2 numerous common questions of law *and* fact, will best serve the interest of judicial economy
3 and efficiency. Counsel for all of the respondents in the Western District Related Cases have
4 indicated they have no objection to consolidation of these related cases with this action, Decl.
5 of Hugh F. Bangasser, ¶2.
6

7 **II. STATEMENT OF FACTS**

8 On December 11, 2014, Petitioner petitioned the Court to enforce an IRS summons
9 against Microsoft. That summons relates to the IRS's examination of Microsoft's 2004 - 2006
10 taxable years, and requests documents and information that the IRS claims relate to an
11 examination of Microsoft's cost sharing arrangements covering the production and
12 distribution of software products in certain Asian and Pacific markets, as well as Western
13 Hemisphere markets. Bernard Decl., Dkt. No. 7, at 1-2. By December 24, less than two
14 weeks later, petitioner had filed additional actions seeking to enforce what the Petitioner
15 concedes to be at least 11 "related" summonses, including the nine summons at issue in the
16 Western District Related Cases.¹ The Petitioner concedes that the designated summons and
17 these related summonses "all relate to the IRS's examination of the Microsoft's income tax
18 liability" for those years. United States Notice of Related Cases, Dkt. No. 13. The Petitioner
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22 ¹ The other two related cases identified to date are pending in the Northern District of
23 California and the Central District of California. *United States v. Veghte*, 4:14-cv-05565-JST
24 (N.D. Cal. filed Dec. 22, 2014); *United States v. Mathews*, 2:14-mc-1169-FMO-PLA (C.D.
25 Cal. filed Dec. 22, 2014). Microsoft intends to intervene in those cases, as of right, under 26
26 U.S.C. § 7609(b)(1). Absent an agreement with Petitioner to change the venue of those cases
to the Western District of Washington, Microsoft further intends to file motions to change
venue or to stay those proceedings pending the outcome of the instant case. Should venue be
changed to the Western District of Washington, Microsoft will seek further consolidation of
those cases with the instant case.

1 also endorses the proposition that all the Western District Related Cases should be assigned to
2 the same judge. (*Id.*) More such actions appear to be imminent.

3 4 **III. ARGUMENT**

5 Under LCR 42(a), a party may file a motion to consolidate its case with one or more
6 related cases pending in the Western District of Washington. Now that Petitioner has filed the
7 nine Western District Related Cases, this Court is faced with the urgent question of how best
8 to deal with all these related actions. Microsoft believes that for reasons of judicial economy
9 and efficiency they should all be consolidated with this case for all purposes, including trial.

10 Federal Rule of Civil Procedure 42(a) permits consolidation of actions "involving a
11 common question of law or fact." Courts are vested with broad discretion to consolidate cases
12 pending in the same district. *Inv. Research Co. v. U. S. Dist. Court for Cent. Dist. Of Cal.*,
13 877 F.2d 777 (9th Cir. 1989). In determining whether consolidation is warranted, courts look
14 to the existence of common questions of law or fact and whether the interests of judicial
15 economy will be served. *See In re Adams Apple, Inc.*, 829 F.2d 1484, 1487 (9th Cir. 1987).

16 Petitioner proposes a series of half-measures. In a shift from its prior representation
17 that some but not all of these cases should be consolidated (Response to Motion for Status
18 Conference, Dkt. No. 10, at 3 n.2.), Petitioner now argues "that these cases are not appropriate
19 for consolidation," but nevertheless claims that "it may be desirable . . . to have all the cases
20 assigned to the same Judge." United States Notice of Related Cases, Dkt. No. 13, at 2. These
21 shifting and inconsistent half-measures make no sense for either the Court or the parties:

- 22 • As a matter of law and as the Petitioner admits, all of the Western District Related

23 Cases are related to the allegedly "designated" summons at issue in this case. 26

1 U.S.C. § 6503(j)(1)(A)(ii) (defining a "related" summons as "any other summons
2 which is issued during the 30-day period which begins on the date on which such
3 designated summons is issued and which relates to the same return as such
4 designated summons").

- 5
6 • Petitioner agrees that the Western District Related Cases and this case as well as
7 other summons currently pending all are related “to the IRS’s examination of the
8 federal income tax liabilities of Microsoft for the 2004-2006 taxable periods. *Id.*,
9 at 2-3, 7 and US Notice of Related Cases, Dkt. No.13 at p. 2. All of the IRS’s
10 summonses for documents and testimony are for the 2004-2006 taxable years. *Id.*
11 Those summons are directed to examinations of Microsoft’s cost sharing
12 arrangements covering the production and distribution of software products in
13 certain Asian and Pacific markets, as well as Western Hemisphere markets for
14 those years. Bernard Decl., Dkt. 7, at 1-2. *See also*, LCR 3(f)(2)(A).
15
16 • The Western District Related Cases and this case present numerous common
17 questions of law and fact, including but not limited to:
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 - 19 ○ whether the petitions and supporting declarations fail to allege specific
20 facts showing the IRS's satisfaction of the pre-issuance review requirement
21 under 26 U.S.C. § 6503(j)(2)(a)(i), a statutory condition precedent to the
22 issuance of valid designated and related summonses (*see* Microsoft’s
23 Reply, Dkt. No. 12, at 3).

- whether the IRS had already made its determination prior to the time that these summonses were issued (*see* Microsoft's Motion for Status Conference, Dkt. No. 6, at 6-7);
 - whether the IRS was prepared to issue a statutory notice of deficiency prior to seeking judicial enforcement of these summonses (*see id.*, at 7);
 - whether the IRS's issuance of this eleventh-hour barrage of summonses was in bad faith (*id.*);
 - whether enforcement of these summonses, so that the IRS can delegate an inherently governmental function to a commercial litigation firm, would constitute an abuse of process (*id.*); and
 - whether 26 C.F.R. § 301.7601-1T(b)(1) is invalid. *Id.*
- The IRS served Microsoft with notice under 26 U.S.C. § 7609(a) with respect to each of the summonses at issue in the Western District Related Cases not served directly on Microsoft, and Microsoft is entitled to intervene as of right in all of those cases under 26 U.S.C. § 7609(b)(1).
 - Many if not all of Microsoft's affirmative defenses will apply to all of the Western District Related Cases as well as this proceeding.
 - Consolidation would avoid conflicts, conserve resources, and promote an efficient determination. *See* LCR 3(g). The Petitioner concedes this in acknowledging there are benefits of judicial economy and avoidance of conflicting results from assignment to, but not consolidation before, a single judge.

- The Petitioner's sole defense to consolidation is a set of conclusory allegations of hypothetically unique defenses that would eliminate the obvious judicial and personal savings that come with consolidation. However, a review of the summonses to different entities and individuals reveals overwhelming overlap, i.e., the same topics, the same time periods, and the same geographic scope in all of the summonses. Moreover, the individual respondents are all present or former Microsoft employees.
- The Petitioner has not identified any meaningful economic savings to either the Court or the individual respondents from denial of consolidation. At best, if there are some distinct defenses only applicable to certain respondents, as the case(s) proceed, they can be addressed with the various tools the Court has to manage litigation.
- Failure to consolidate these concededly related cases, on the other hand, would likely result in unduly burdensome duplication of labor and expense, and the potential for conflicting and inconsistent adjudication. *See* LCR 3(f)(2)(B).

It follows that consolidating all of the Western District Related Cases with this case, all of which involve numerous common questions of law and fact, will best serve the interest of judicial economy and efficiency.

WHEREFORE, Microsoft respectfully requests that this Motion be granted, and that the Court issue an order consolidating the Western District Related Cases with this case for all purposes including trial.

1 Respectfully submitted this 31st day of December, 2014.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify under penalty of perjury that on December 31, 2014, I electronically filed the
3 foregoing, with attached proposed order, with the Clerk of the Court using the CM/ECF
4 system, which will send notification of such filing to all parties.
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6 s/ Hugh F. Bangasser
7 Hugh F. Bangasser
8 K&L GATES LLP
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